

Amend Section 7093.6 of the Sales and Use Tax Law to allow the Board to compromise certain final tax liabilities of 1) businesses that are not discontinued or transferred if the final tax liability arises from transactions in which the taxpayer did not receive sales tax or use tax reimbursement, 2) persons liable for successor liability, and 3) consumers incurring a use tax liability. To the extent they are applicable, similar provisions would be incorporated into the Board-administered special taxes and fees programs.

Source: Honorable Bill Leonard

Existing Law

Under existing law, Section 7093.6 of the Sales and Use Tax Law allows the Board to compromise a final tax liability if certain requirements are met. This section was added in 2002 by AB 1458 (Stats. 2002, Ch. 152) and became effective January 1, 2003. Consistent with that provision, the Board has created an Offers in Compromise (OIC) Section which is solely responsible for making compromises under the provisions of Section 7093.6. Compromises are accepted when a tax liability is final, and the OIC Section finds that the amount the taxpayer proposes to pay represents the maximum amount the Board can expect to collect from that taxpayer in a reasonable period of time – typically five to seven years.

Under the law, one of the requirements to compromise a final tax liability is that an offer can only be considered with respect to liabilities that were generated from a business that has been discontinued or transferred, where the taxpayer making the offer no longer has a controlling interest or association with the transferred business or a controlling interest or association with a similar type of business as the transferred or discontinued business.

This proposal would allow the Board to compromise certain types of final tax liabilities where this requirement is not met.

This Proposal

This proposal is seeking to allow compromises for taxpayers who may otherwise have to sell or discontinue their businesses because of their inability to pay in full a final tax liability that arose from transactions in which the taxpayers did not collect sales tax reimbursement or use tax from the purchasers or other persons. These situations often arise because a taxpayer mistakenly believed that the transactions were exempt or excluded from tax. Upon audit, the taxpayer first learns that these transactions are subject to tax, but the taxpayer cannot legally or realistically collect tax reimbursement from his or her customers. In addition, this proposal allows compromises from successor liability where the successor is

still in business¹, and from use tax determined by the Board against a consumer who is not required to hold a seller's permit.

This proposal would allow such final tax liabilities to be compromised if the other requirements of Section 7093.6 are met even though the taxpayer still owns and operates the business or similar type of business. However, this proposal only applies to "qualified final tax liabilities" which are (1) determined liabilities to the extent that they arise from transactions in which tax reimbursement was not collected by the taxpayer from the purchasers or other persons, (2) successor liabilities, and (3) determined use tax liabilities made against consumers who are not required to hold a seller's permit with the Board. The current requirement of a discontinued or transferred business would still apply to all other final tax liabilities, such as determined liabilities arising from transactions in which the taxpayer has collected tax reimbursement.

This proposal would also do the following:

- 1) Provide taxpayers that do not have the ability to pay an offer with a lump sum amount with an option to pay an offered amount in installments for a period not exceeding one year, at the Board's discretion.
- 2) Specify that the Board may choose to have payments remitted via electronic funds transfer or other means (in order to reduce or improve the default rate that sometimes accompanies installment payments).
- 3) Specify that the Members of the Board may not participate in any offers in compromise matters, except for approvals for recommended compromises.
- 4) Specify that a taxpayer that receives a compromise under this proposal may be required to enter into a collateral agreement that may include a provision that allows the Board to reestablish the liability, or any portion thereof, if the taxpayer has sufficient annual income during the succeeding five-year period.
- 5) Specify that a taxpayer that receives a compromise under this proposal is required to file and pay by the due date all subsequently required returns for a five-year period from the date the liability is compromised.
- 6) Provides for the rescission of the compromise if the taxpayer fails to comply with the provisions of the statute or any collateral agreement.

Offers in Compromise programs are also available for income tax liabilities due the Internal Revenue Service (IRS) and the Franchise Tax Board (FTB), as well as employment tax liabilities due the Employment Development Department (EDD). Both the IRS and FTB's programs have the ability to compromise liabilities of ongoing businesses, and according to FTB, are frequently made with collateral agreements. Thus, this proposal would provide further consistency with those tax agencies' programs. Also, the IRS and EDD allow installment

¹ Current law holds a purchaser of a business personally liable for the unpaid sales and use tax liability of the seller up to the purchase price of the business, if the purchaser fails to withhold sufficient funds to cover the liability.

payment option terms for offered amounts where the offered funds cannot be paid in a lump sum.

Section 7093.6 of the Revenue and Taxation Code is amended to read:

7093.6. (a)(1) Beginning January 1, 2003, the executive director and chief counsel of the board, or their delegates, may compromise any final tax liability in which the reduction of tax is seven thousand five hundred dollars (\$7,500) or less.

(2) Except as provided in paragraph (3), the board, upon recommendation by its executive director and chief counsel, jointly, may compromise a final tax liability involving a reduction in tax in excess of seven thousand five hundred dollars (\$7,500). Any recommendation for approval of an offer in compromise that is not either approved or disapproved within 45 days of the submission of the recommendation shall be deemed approved.

(3) The board, itself, may by resolution delegate to the executive director and the chief counsel, jointly, the authority to compromise a final tax liability in which the reduction of tax is in excess of seven thousand five hundred dollars (\$7,500), but less than ten thousand dollars (\$10,000).

(b) For purposes of this section, "a final tax liability" means any final tax liability arising under Part 1 (commencing with Section 6001), Part 1.5 (commencing with Section 7200), Part 1.6 (commencing with Section 7251), and Part 1.7 (commencing with Section 7280) or related interest, additions to tax, penalties, or other amounts assessed under this part.

(c)(1) Offers in compromise shall be considered only for liabilities that were generated from a business that has been discontinued or transferred, where the taxpayer making the offer no longer has a controlling interest or association with the transferred business or has a controlling interest or association with a similar type of business as the transferred or discontinued business.

(2) Notwithstanding paragraph (1), a qualified final tax liability may be compromised regardless of whether the business has been discontinued or transferred or whether the taxpayer has a controlling interest or association with a similar type of business as the transferred or discontinued business. All other provisions of this section that apply to a final tax liability shall also apply to a qualified final tax liability, and no compromise shall be made under this subdivision unless all other requirements of this section are met. For purposes of this subdivision, a "qualified final tax liability" means:

(A) That part of a final tax liability, including related interest, additions to tax, penalties or other amounts assessed under this part, arising from a transaction or transactions in which there is no evidence that the taxpayer collected sales tax reimbursement or use tax reimbursement from the purchaser or other person and which was determined against the taxpayer

under Article 2 (commencing with Section 6481), Article 3 (commencing with Section 6511), and Article 5 (commencing with Section 6561) of Chapter 5.

(B) A final tax liability, including related interest, additions to tax, penalties or other amounts assessed under this part, arising under Article 7 (commencing with Section 6811); or

(C) That part of a final tax liability for use tax, including related interest, additions to tax, penalties or other amounts assessed under this part, determined under Article 2 (commencing with Section 6481), Article 3 (commencing with Section 6511), and Article 5 (commencing with Section 6561) of Chapter 5 against a taxpayer who is a consumer that is not required to hold a permit under Section 6066.

(3) A qualified final tax liability may not be compromised with:

(A) A taxpayer who previously received a compromise under paragraph (2) for a liability, or a part thereof, arising from a transaction or transactions that are substantially similar to the transaction or transactions attributable to the liability for which the taxpayer is making the offer; or

(B) A business that was transferred by a taxpayer who previously received a compromise under paragraph (2) and who has a controlling interest or association with the transferred business, when the liability for which the offer is made is attributable to a transaction or transactions substantially similar to the transaction or transactions for which the taxpayer's liability was previously compromised; or

(C) With a business in which a taxpayer who previously received a compromise under paragraph (2) has a controlling interest or association with a similar type of business for which the taxpayer received the compromise, when the liability of the business making the offer arose from a transaction or transactions substantially similar as the transaction or transactions for which the taxpayer's liability was previously compromised.

(d) The board may, in its discretion, enter into an agreement which permits the taxpayer to pay the compromise in installments for a period not exceeding one year. The agreement may provide that such installments shall be paid by electronic funds transfers or any other means to facilitate the payment of each installment.

(e) Except for any recommendation for approval as specified in subdivision (a), the members of the State Board of Equalization shall not participate in any offer in compromise matters pursuant to this section.

(f) A taxpayer that has received a compromise under paragraph (2) of subdivision (c) may be required to enter into any collateral agreement that is deemed necessary for the protection of the interests of the state. A collateral agreement may include a provision that allows the board to reestablish the liability, or any portion thereof, if the taxpayer has sufficient annual income during the succeeding five-year period. The board shall establish criteria for determining "sufficient annual income" for purposes of this subdivision.

(g) A taxpayer that has received a compromise under paragraph (2) of subdivision (c) shall file and pay by the due date all subsequently required

sales and use tax returns for a five-year period from the date the liability is compromised, or until the taxpayer is no longer required to file sales and use tax returns, whichever period is earlier.

~~(d)~~ (h) For amounts to be compromised under this section, the following conditions shall exist:

(1) The taxpayer shall establish that:

(A) The amount offered in payment is the most that can be expected to be paid or collected from the taxpayer's present assets or income.

(B) The taxpayer does not have reasonable prospects of acquiring increased income or assets that would enable the taxpayer to satisfy a greater amount of the liability than the amount offered, within a reasonable period of time.

(2) The board shall have determined that acceptance of the compromise is in the best interest of the state.

~~(e)~~ (i) A determination by the board that it would not be in the best interest of the state to accept an offer in compromise in satisfaction of a final tax liability shall not be subject to administrative appeal or judicial review.

~~(f)~~ (j) When an offer in compromise is either accepted or rejected, or the terms and conditions of a compromise agreement are fulfilled, the board shall notify the taxpayer in writing. In the event an offer is rejected, the amount posted will either be applied to the liability or refunded, at the discretion of the taxpayer.

~~(g)~~ (k) When more than one taxpayer is liable for the debt, such as with spouses or partnerships or other business combinations, the acceptance of an offer in compromise from one liable taxpayer shall not relieve the other taxpayers from paying the entire liability. However, the amount of the liability shall be reduced by the amount of the accepted offer.

~~(h)~~ (l) Whenever a compromise of tax or penalties or total tax and penalties in excess of five hundred dollars (\$500) is approved, there shall be placed on file for a least one year in the office of the executive director of the board a public record with respect to that compromise. The public record shall include all of the following information:

(1) The name of the taxpayer.

(2) The amount of unpaid tax and related penalties, additions to tax, interest, or other amounts involved.

(3) The amount offered.

(4) A summary of the reason why the compromise is in the best interest of the state.

The public record shall not include any information that relates to any trade secrets, patent, process, style of work, apparatus, business secret, or organizational structure, that if disclosed,

would adversely affect the taxpayer or violate the confidentiality provisions of Section 7056. No list shall be prepared and no releases distributed by the board in connection with these statements.

~~(i)~~ (m) Any compromise made under this section may be rescinded, all compromised liabilities may be reestablished (without regard to any statute of limitations that otherwise may be applicable), and no portion of the amount offered in compromise refunded, if either of the following occurs:

(1) The board determines that any person did any of the following acts regarding the making of the offer:

(A) Concealed from the board any property belonging to the estate of any taxpayer or other person liable for the tax.

(B) Received, withheld, destroyed, mutilated, or falsified any book, document, or record or made any false statement, relating to the estate or financial condition of the taxpayer or other person liable for the tax.

(2) The taxpayer fails to comply with any of the terms and conditions relative to the offer.

~~(j)~~ (n) Any person who, in connection with any offer or compromise under this section, or offer of that compromise to enter into that agreement, willfully does either of the following shall be guilty of a felony and, upon conviction, shall be fined not more than fifty thousand dollars (\$50,000) or imprisoned in the state prison, or both, together with the costs of investigation and prosecution:

(1) Conceals from any officer or employee of this state any property belonging to the estate of a taxpayer or other person liable in respect of the tax.

(2) Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax.

~~(k)~~ (o) For purposes of this section, "person" means the taxpayer, any member of the taxpayer's family, any corporation, agent, fiduciary, or representative of, or any other individual or entity acting on behalf of, the taxpayer, or any other corporation or entity owned or controlled by the taxpayer, directly or indirectly, or that owns or controls the taxpayer, directly or indirectly.